Supreme Court, U.S.
FILED
MAR 8 1999
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No. 98-1257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE KIRSTEIN and JOY KIRSTEIN,

Petitioners,

v.

PARKS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PARKS CORPORATION IN OPPOSITION

MICHAEL W. RATHSACK
(Counsel of Record)
111 West Washington Street
Suite 1762
Chicago, Illinois 60602
(312) 726-5433

WILLIAM E. SPIZZIRRI
KRALOVEC & MARQUARD, CHTD.
122 South Michigan Avenue
Suite 1720
Chicago, Illinois 60603
(312) 939-4455

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTION PRESENTED FOR REVIEW

The question actually presented for review is whether a trial court confronted at the conclusion of discovery with a motion for summary judgment raising a *Daubert* challenge must hold a separate evidentiary hearing before ruling on that motion.

STATEMENT OF THE CASE

The facts were taken from submissions, including the 190-page deposition of plaintiffs' expert witness, filed in the course of summary judgment.

Plaintiff George Kirstein used defendant Parks Corporation's adhesive remover on his floor. Kirstein then used a lacquer thinner to remove the remaining residue. A fire ensued, injuring Kirstein. Plaintiffs claimed Parks' adhesive remover was unreasonably dangerous. Plaintiffs' only expert witness, Dr. Nelson, opined the adhesive was unreasonably dangerous because a chemical in the lacquer thinner was absorbed into the residue of the adhesive remover and resulted in a continuous burn once the vapors from the thinner were ignited. App. at 18a, 19a (appendix to the petition). After discovery was closed, defendants including Parks Corporation moved for summary judgment and raised a *Daubert* challenge to plaintiffs' expert. App. at 38a.

The trial court reviewed Nelson's deposition. App. at 37a. That court noted that Nelson was not a chemist, did not test the chemicals, and did not follow the scientific methodology he said engineers use. App. at 18a, 21a, 39a. Nelson did not testify that the adhesive's flammability was increased by its combination with the lacquer thinner. App. at 18a. Finally, there was no scientific evidence that Parks' adhesive remover absorbed a chemical from the lacquer thinner. App. at 19a. [Parks also presented its own technical evidence denying any synergistic effect when the two chemicals were combined. Doc. No. 39, Parks mem., Ex. B.]

The trial court applied *Daubert* and found Nelson's testimony on this point inadmissible. *Kirstein v. W.M. Barr & Company*, 983 F.Supp. 753 (N.D. Ill. 1997). Plaintiffs attempted to add, in a F.R.C.P. 59(e) motion, the report of a witness who tested the chemicals, but the court denied that tardy request. App. at 38a. The Seventh Circuit affirmed, noting there was no evidence of how the two products acted in combination. *Kirstein v. Parks Corporation*, 159 F.3d 1065, 1069 (7th Cir. 1998).

ARGUMENT

THERE IS NO CONFLICT AMONG THE CIRCUITS, AND THE QUESTION OF WHETHER THE TRIAL COURT PROPERLY APPLIED *DAUBERT* AND BARRED CERTAIN EXPERT TESTIMONY UNDER THE PARTICULAR FACTS OF THIS CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The record shows the trial court carefully followed *Daubert* and its progeny in deciding the admissibility of plaintiffs' contested "scientific" evidence. The court had before it all the evidence plaintiffs wanted it to have. It reviewed the various documents submitted, including the deposition of the expert witness whose testimony was challenged in the summary judgment motion. It then performed the gatekeeper function ordered by this Court. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 596, 113 S.Ct. 2786, 2794, 2798 (1993); *General Electric Company v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997). Based on the evidence, the court concluded that plaintiffs'

proffered scientific opinion that the fire was caused by an unreasonably dangerous condition of Parks' product did not meet the *Daubert* test.

Petitioners raise no circuit court or even district court conflict as to the precise procedure to use when applying *Daubert*. Petitioners simply contend there must be a separate *Daubert* hearing, arguing by implication that the admissibility of scientific evidence cannot be decided in the course of summary judgment. However, the petition provides no specific grounds for placing further constraints on the procedure to be used when determining the admissibility of evidence under *Daubert* and offers no reason why such a determination cannot be made during a summary judgment proceeding. In fact, this Court implicitly approved such a procedure in *General Electric Company v. Joiner*, *id.* at 516. The *Daubert* question at issue there actually arose out of a summary judgment proceeding, and all involved accepted use of that procedure without contest.

In any event, the trial court here had all the evidence plaintiffs wanted to introduce, and the court carefully weighed that evidence. The due process requirements recited in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 854 (3rd Cir. 1990) (reversed because depositions of expert witnesses were not even allowed), were thus completely met. Therefore, even if there is a need to create further standards for applying *Daubert*, the facts of this case do not present the appropriate forum.

CONCLUSION

For the reasons stated, respondent Parks Corporation requests that the petition for writ of certiorari be denied.

Respectfully submitted,

MICHAEL W. RATHSACK
(Counsel of Record)
111 West Washington Street
Suite 1762
Chicago, Illinois 60602
(312) 726-5433

WILLIAM E. SPIZZIRRI
KRALOVEC & MARQUARD, CHTD.
122 South Michigan Avenue
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